

## TERRAZAS LAW OFFICES

ELIZABETH A. CLARK  
JULIE D. GOODKIND  
ANDRÉ GURR  
ROBERT TERRAZAS, P.C.

1923 S. HIGGINS AVENUE  
P.O. Box 9077 - MISSOULA, MONTANA 59807  
www.terrazaslaw.com

TELEPHONE (406) 541-2550  
FAX (406) 541-2553  
attorneys@terrazaslaw.com

March 31, 2015

Montana Senators,  
Senate Business and Labor Committee

RE: HB 515

Dear Senators:

I understand there is a hearing before the Business and Labor Committee April 1, 2015 on HB 515, proposing to amend Montana's probate code to prohibit a person from serving as the personal representative of the estate of his or her former spouse. HB 515 is unnecessary, bad legislation for a constellation of reasons.

Montana's probate code, as written, allows a surviving parent, as guardian of a minor child, to step in the shoes of the child who otherwise would have priority to serve as the personal representative of his deceased parent's estate, but for the fact that the child is a minor. It is a mistake to pass legislation based upon one case where the minor's grandparents opposed the surviving parent's ability to serve as personal representative solely because she was divorced from the decedent.

The proposal ignores the role of a Judge in a probate case, who is in the best position to observe the people involved, and has the tools and judicial discretion to determine the best interests of the estate and its heirs, based on the facts and circumstances.

The overarching public policy to consider when reviewing this proposed change to Montana's probate code is whether the probate code should place the interests of the parents of a decedent over those of the decedent's minor children. Where the children are the sole heirs of the estate but cannot serve as personal representative solely because they are minors, their surviving parent, as their guardian and conservator, is in the best position to serve on their behalf.

The proposed legislation ought to be rejected since it effectively seeks to re-write the statutory hierarchy for a personal representative, and elevate the interests of surviving parents of an adult decedent over the interests of that decedent's minor children. This legislation is unnecessary, in light of other statutory protections of the probate code, and the statutory and constitutional rights of a surviving parent to protect their minor child's best interests.





The proposed legislation ignores the Montana Legislature's long history of promoting the best interests of children, including children of a deceased parent, and the legislative duties required by the United States and Montana Supreme Courts.

- Montana statute already seeks to avoid conflict between a surviving parent and grandparents by deferring to a fit surviving parent's wishes and limiting or even prohibiting grandparent rights to contact grandchildren (see §40-9-101 et seq.). The proposed legislation contradicts these parental rights and is inconsistent with existing Montana statute, and long-standing U.S. Supreme Court and Montana Supreme Court decisions spanning nearly one hundred years of Montana history.

- As U.S. Supreme Court Justice Sandra Day O'Connor wrote in a primary case addressing parental rights in conflict with the rights of non parents to determine the best interests of a child as it effects grandparent rights: ". . . the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 2065, 147 L.Ed.2d 49 (2000).

- Further, the proposed legislation contradicts and is inconsistent with what Montana Supreme Court Justice Laurie McKinnon set forth in *Est. of C.K.O.*, 2013 MT 72, 369 Mont. 297, 297 P.3d 1217. The proposal to appoint a third party non parent or guardian to ostensibly protect a child's best interests creates conflict between multiple representatives' inconsistent and irreconcilable positions. *C.K.O.*, ¶26. Appointing a third party representative for a child over a parent's objection or without a parent's consent is contrary to a parent's statutory and constitutional rights. *C.K.O.*, ¶¶20,24-28.

- The proposed legislation undermines these long-standing, stable, and venerable principles.

If the legislature is going to prioritize the interests of the parents of an adult decedent over the interests of the decedent's own minor children, then the proposed amendment does so. However, if the legislature is going to uphold the children's best interests as paramount, then who better to represent the children's best interests than their surviving parent? The surviving parent is best suited to pursue claims on behalf of a former spouse's estate when the sole heirs and beneficiaries are the surviving parent's minor children.

The proposed legislation minimizes a surviving parent's ability to protect the best interests of his or her minor children. In the event the adult decedent's parents are unable or unwilling to serve, a public administrator, a creditor, or other third party has more authority than the minor's surviving parent to pursue claims on the minor's behalf.

The surviving parent of the minor is in the best position to pursue claims that ultimately benefit the children, and to act on behalf of the minor. Creating a blanket prohibition on that





surviving parent's ability to serve, regardless of the circumstances, multiplies proceedings and conflict rather than resolving them. It creates a back door for grandparents to circumvent the authority of a surviving parent to pursue claims that ultimately compensate their minor child for the loss of a parent.

Purported concerns of conflicts of interest or excessive charges by the personal representative are already addressed under current Montana law and Probate Code safeguards (such as fee caps, statutory scheme to remove P.R., judicial supervision, etc.).

Fees for a personal representative are a non-issue. The personal representative's fee is regulated by statute, regardless of whether the person is the former spouse, parent, stranger, or third party. Section 72-3-631 M.C.A. Assuming the former spouse will step in and take a bigger fee to "take money away from the kids" is purely speculative. The same derogatory characterization can be made of grandparents, a stranger to the children, or a third party.

This legislature already invoked statutory safeguards in the probate code to protect against a personal representative who is not acting in the best interests of the estate and its beneficiaries. A blanket prohibition on a surviving parent to probate the estate of his or her former spouse on behalf of their minor children unnecessarily creates a void that in some cases can only be filled by a stranger to the decedent and the heirs. This stranger is granted authority, trumping the heir's surviving parent, to determine the best interests of the estate, the minor children, and the pursuit of claims on their behalf while the minor's surviving parent stands idly by.

Moreover, a divorced parent already has the ability to appoint a different personal representative over his estate if he or she so chooses. It is natural for a surviving parent to act as the guardian/conservator for their children when no such nomination is made. Changing this natural/default/intestate rule is not necessary, creates conflict, and is unconstitutional. The proposed changes will have shocking consequences that reverberate through parenting rights, estate planning, guardianships and conservatorships, among other areas of law.

The statutes that prevent a former spouse from reaping the material benefits of a decedent spouse should not determine who has authority to probate the estate of a minor's parent. When the surviving parent acts as Personal representative on behalf of his or her minor children, the surviving parent acts for the benefit of the children to pursue claims and distribute property of the estate for the benefit of the children, not for the parent's own benefit. A grandparent or third party has the same capacity if not more to abuse the power of a Personal representative as a surviving parent.





I hope you will consider these issues carefully and vote against HB 515 and its amendment to Montana's probate code. Please call me if you have any questions.

Cordially,

TERRAZAS LAW OFFICES

By: /s/ Robert Terrazas  
Robert Terrazas, P.C.

